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IN THE  
**Supreme Court of the United States**

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JAYBIRD MINING COMPANY, A CORPORATION,  
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, RESPONDENT.

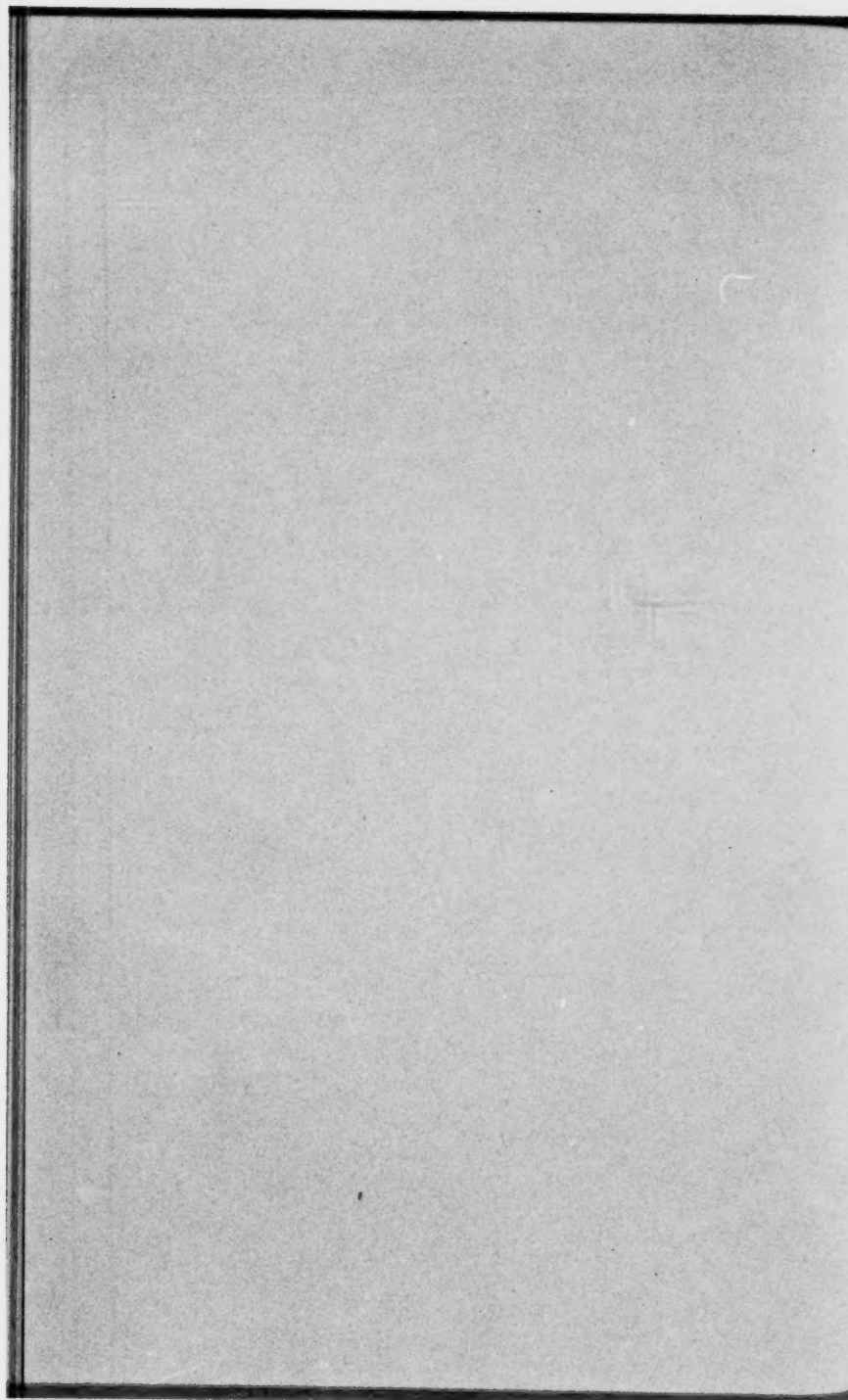
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**PETITION FOR WRIT OF CERTIORARI AND  
BRIEF IN SUPPORT THEREOF.**

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COUNTY, OKLAHOMA, RESPONDENT.

---

**PETITION FOR WRIT OF CERTIORARI.**

*To the Honorable, the Supreme Court of the United States:*

Your petitioner, Jaybird Mining Company, most respectfully shows to the court as follows:

I.

This action was brought by your petitioner originally, and filed in the District Court of Ottawa County, in the State of Oklahoma, on the 28th day of January, 1922, against the respondent, Joe Weir, county treasurer of Ottawa County, Oklahoma, charging:

(a) That the petitioner was a corporation organized and existing under the laws of the State of Oklahoma and engaged in the mining of lead and zinc ores in

Ottawa County thereof, and the respondent was the duly elected, qualified and acting county treasurer of said county, and as such officer was collecting taxes for the year of 1921.

(b) That the Congress of the United States, on March 2, 1895 (28 Stats. p. 907) enacted the following statute :

*"Be it enacted, etc., that the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; Provided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."*

That pursuant to the authority granted in said act, the Secretary of the Interior caused a patent to be issued to Hum-bah-wat-tah Quapaw, a member of the Quapaw tribe of Indians, for an allotment of land described as Southwest Quarter of Northeast Quarter of Section 30, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma, containing a restriction against alienation for the period of twenty-five years from the date thereof, the 26th day of September, 1896; that the restrictions against alienation on said al-

lotment were further extended by act of Congress dated March 3, 1921 (41 Stats. 1225-1248) for an additional period of twenty-five years thereafter.

(c) That the Congress of the United States, on June 7, 1897 (30 Stats. p. 72) enacted the following statute:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary; Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

That the Quapaw tribe of Indians, of which Hum-bah-wat-tah Quapaw was a member, were within the limits and jurisdiction of the Quapaw Agency and came within the provisions of the last-mentioned leasing statute, and the lands above described have been at all times and now are subject to the restrictions and limitations imposed in said acts of Congress and the patent issued thereunder.

(d) That your petitioner is now and has been for several years last past operating a lead and zinc mine

upon the above described property, and did have in its ore bins on January 1, 1921, a quantity of lead and zinc ores mined during the year of 1920; that your petitioner mined said ore pursuant to its right obtained under mining lease executed under the terms of the leasing statute above mentioned, and was approved by the Secretary of the Interior pursuant to authority granted in the act of Congress of June 7, 1897, *supra*.

(e) That the said allottee and her heirs have been at all times, and now are, wards of the United States Government, and the Secretary of the Interior had, prior to the production of said minerals, declared said Indian land owners to be incapable of managing their allotted lands with benefit to themselves, and said Secretary of the Interior had assumed control and management of the mining of said lands for and on behalf of said Indian owners, and all royalties accruing on ores had been paid direct to the Secretary of the Interior.

(f) That Congress, by the acts above named, expressed the policy of the Federal Government towards the leasing of Quapaw lands and securing the development of minerals thereunder for the benefit of the Indian owners and the leasing thereof by the Secretary of the Interior was an act of the Secretary of the Interior carrying out the policy of the United States Government.

(g) That your petitioner, in carrying out its contract with the Secretary of the Interior in the mining of lead and zinc ores under its lease, was complying with and carrying out the terms of a Federal agency and

governmental policy toward its Quapaw Indian wards, with a view of protecting and developing the mineral lands of these Indians.

(h) That on January 1, 1921, the ores sought to be taxed by the State of Oklahoma were in the bin in mass, with the royalty or equitable interest of the Indian landowner unsegregated and unpaid, the terms of the lease providing for payment of royalty or percentage of gross proceeds derived from the sale thereof.

(i) That your petitioner has paid to the Auditor of the State of Oklahoma, pursuant to Chapter 39 of the Session Laws of 1916 of the State of Oklahoma, the gross production tax on the ores so assessed when sold and during the tax year in which same was produced, and prior to June 30, 1921.

(j) That the taxing officials of Ottawa County, Oklahoma, for the year of 1921 wrongfully and unlawfully, and without authority, caused the ores in the bins of this petitioner on said land on January 1, 1921, to be assessed an *ad valorem* tax in the amount of \$2319.80. Your petitioner, pursuant to the statutes of the State of Oklahoma, paid said tax so assessed under protest.

(k) That the taxing officials of Ottawa County and the State of Oklahoma were without authority to assess any *ad valorem* tax as against said ores for the reason said ores were exempt from state tax, as the petitioner was a part of a Federal agency and was assisting the Secretary of the Interior and the United States Government in carrying out a governmental policy toward wards of the Government.

## II.

That your petitioner did, within thirty days after payment of said tax, file its suit in the District Court of Ottawa County, Oklahoma, for the recovery of moneys so paid.

## III.

The respondent filed a general demurrer to the petition filed, and after same was overruled by the court refused to plead further, and the court thereupon entered judgment on the 8th day of July, 1922, in favor of your petitioner for the sum prayed for together with interest thereon.

## IV.

The respondent perfected an appeal from the judgment of the District Court of Ottawa County, Oklahoma, to the Supreme Court of the State of Oklahoma, and after argument thereon the Supreme Court of the State of Oklahoma reversed the judgment of the District Court and directed the District Court to enter judgment sustaining the demurrer of the county treasurer, respondent herein, and held:

“Where lead and zinc ores extracted from lands of restricted Quapaw Indians are stored in the bins of the lessee and assessed for taxation on the day fixed by the laws of the state, such ores, being personalty and private property of the lessee, are not exempt from *ad valorem* taxation.”

And further held:

"The tax imposed by Section 9814, Compiled Statutes of 1921, is not upon a Federal agency nor upon the right to exercise or operate a Federal agency, but is upon the lessee's individual private property."

The opinion of the Supreme Court of the State of Oklahoma was filed on October 21, 1924. Thereafter and within the time allowed by rules of said court, petition for rehearing was filed and same was denied by the Supreme Court of the State of Oklahoma in its order filed on December 9, 1924.

#### V.

Your petitioner is advised and believes that the said judgment of the Supreme Court of the State of Oklahoma, which is the court of last resort in said state having jurisdiction of this cause, is erroneous, and that this honorable court should require said case to be certified to it for its review and determination, in conformity with the provisions in Section 237 of the Federal Judicial Code.

#### VI.

A certified copy of the entire record of said cause in the Supreme Court of the State of Oklahoma is hereby furnished, attached to and made a part of this petition, and marked Exhibit "A," in compliance with the rules of this court.

## VII.

Your petitioner believes the judgment of the Supreme Court of the State of Oklahoma herein rendered is erroneous in that it holds valid an *ad valorem* tax upon the gross product of a Federal agency engaged in carrying out the governmental policies toward Indian wards of the Government, and further in holding that the product of the lease is taxable by the State of Oklahoma while conceding that the lease itself is exempt from any tax by said authority.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Oklahoma in said case entitled *Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in Error v. Jaybird Mining Company, a Corporation, Defendant in Error*, No. 14059, to the end that the said case may be reviewed and determined by this court as provided by Section 237 of the Federal Judicial Code; or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Federal Judicial Code; and that the said judgment of the Supreme Court of the State of Oklahoma in said cause, and every part thereof, may be reversed by this Honorable Court.

*C. Scott Thompson*  
Attorney for Petitioner.

*State of Oklahoma, County of Ottawa, ss.*

A. Scott Thompson, attorney for Jaybird Mining Company, of lawful age, being duly sworn, on oath says: That he is attorney for petitioner in the above entitled cause, and that he has read the above and foregoing petition for writ of certiorari; that he is advised and he believes the allegations therein contained are true.

.....

Subscribed and sworn to before me this .... day of January, 1925.

.....,

Notary Public.

My commission expires.

No. ....

IN THE

**Supreme Court of the United States**

---

JAYBIRD MINING COMPANY, A CORPORATION,  
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, DEFENDANT  
IN ERROR.

---

**WRIT OF CERTIORARI.**

*United States of America, ss:*

*The President of the United States of America to the  
Honorable Judges of the Supreme Court of the  
State of Oklahoma, Greeting:*

Being informed that there is now pending before you a suit in which Joe Weir, County Treasurer of Ottawa County, Oklahoma, is plaintiff in error, and Jaybird Mining Company, a corporation, is Defendant in Error, No. 14059 of your docket, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by said Supreme Court of the State of Oklahoma and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the Supreme Court as afore-

said, the record and the proceedings in said cause, so that the Supreme Court may act thereon as of right and according to law, ought to be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States.

.....,  
Clerk of the Supreme Court of  
the United States.

No. ....

IN THE  
**Supreme Court of the United States**

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JAYBIRD MINING COMPANY, A CORPORATION,  
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
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IN ERROR.

JAYBIRD MINING COMPANY, A CORPORATION,  
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, RESPONDENT.

---

**BRIEF FOR PLAINTIFF IN ERROR AND  
PETITIONER.**

---

**STATEMENT.**

For convenience in presenting this matter we will refer to the parties as they appeared plaintiff and defendant in the trial court.

The petition for writ of certiorari, immediately preceding herein, correctly states the facts concerning this

cause. As therein stated, a judgment was rendered upon demurrer, and the sole question involved is the taxability of the ores of the plaintiff.

The plaintiff has perfected an appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States by writ of error and also by petition for writ of certiorari, out of abundance of caution. We will attempt to secure and file with the court a stipulation agreeing that the two may be presented together under the same brief. We believe it unnecessary to make further statement concerning this cause.

*In the Supreme Court of the United States. Jaybird Mining Company, a Corporation, Plaintiff in Error, vs. Joe Weir, County Treasurer of Ottawa County, Oklahoma, Defendant in Error.*

### **ASSIGNMENT OF ERRORS.**

Comes now Jaybird Mining Company, a corporation, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of judgment of the Supreme Court of the State of Oklahoma, and in the opinion filed therein in said cause, manifest errors were committed to its prejudice, which are apparent in the record therein; that the errors committed by the Supreme Court of the State of Oklahoma in the opinion and judgment therein, in said cause, are more fully and particularly set forth as follows:

#### **I.**

The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Ottawa County, Oklahoma, and directing that judgment should be entered by said District Court in favor of the defendant in error herein.

#### **II.**

The Supreme Court of the State of Oklahoma erred in refusing to affirm the decision of the District Court of Ottawa County, Oklahoma.

## III.

The Supreme Court of Oklahoma erred in holding, deciding and determining the statute of the State of Oklahoma approved February 14, 1916, and being Chapter 39 of Session Laws of the State of Oklahoma, extra session, page 102, imposing gross production taxes, are valid, and rendering a decision in favor of its validity, and in not holding it repugnant to the Constitution, treaties and laws of the United States. X

## IV.

The Supreme Court of Oklahoma erred in holding, deciding and determining that the acts of the Treasurer of Ottawa County, Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by the statute mentioned in specification or assignment of Error No. 3 preceding, and other statutes of the State of Oklahoma authorizing the assessment of an *ad valorem* tax, are and were valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, treaties and laws of the United States.

## V.

The Supreme Court of Oklahoma erred in sustaining the validity of the gross production tax law above specified and the statutes of the State of Oklahoma authorizing the assessment of an *ad valorem* tax on lead and zinc ores in the bin on January 1 of the current year, upon such ores unsold of the plaintiff in error herein. X

derived and produced solely from lead and zinc mining leases upon restricted Indian lands under the control of Congress and the Secretary of the Interior.

## VI.

The Supreme Court of Oklahoma erred in reversing the judgment or decree of the District Court of Ottawa County, Oklahoma, and in holding and denying that plaintiff in error was exempt from *ad valorem* tax upon the property so charged, claimed by the plaintiff in error under the Constitution, treaties and laws of the United States.

For which errors the said Jaybird Mining Company, plaintiff in error, prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, and that the Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Ottawa County, Oklahoma, as rendered; and for such other and further relief as to the court may seem just and proper, and for its costs.

A. SCOTT THOMPSON,  
*Attorney for Plaintiff in Error.*

## BRIEF AND ARGUMENT.

### I.

The tax assessed herein under the authority of the Oklahoma "Gross Review" Act of 1916 is void for the reason it constitutes a burden upon the operation of a federal agency and an interference with the exercise of the constitutional powers of the United States government.

The lands from which the ore sought to be taxed herein was taken are owned by a Quapaw restricted Indian. The Quapaws are still under national tutelage. The Government maintains an agency for the supervision of these Indians and their property, and pursuant to the treaty of May 13, 1833 (7 Stat. 424), an annual appropriation is made for education and other assistance (37 Stat. 530). This view is stated as a correct one in *U. S. v. Noble et al.*, 237 U. S. 74. The Government in its treaty with the Quapaws dated May 13, 1833, *supra*, expressed its policy toward these Indians in obligations assumed that are now in full force. They are observed and performed even to this day. Among other things the Government there and then agreed:

"Art. 11. The United States hereby agree to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the Commissioners of Indians Affairs west, and which is expressly designed to be in lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent

home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon, *and they also agree to protect them in their new residence*, against all interruption or disturbance from any other tribe or nation of Indians or *from any other person or persons whatever.*"

2 Kappler Indian Affairs, 396.

Carrying out its treaty obligations to "protect them in their new residence," the Government, by Act of Congress approved March 2, 1895 (28 Stat. 907) allotted these lands in severalty, but with a prohibition against alienation for a period of twenty-five years in the following language:

"Be it enacted, etc. That the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; provided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

It has been definitely and finally held in *Goodrum v. Buffalo*, 162 Fed. 817, that the above act and the patent issued thereunder to a Quapaw Indian prohibited alienation by the allottee or his heirs for the period fixed, and the court said:

"Throughout the dealings with them, both by treaties and legislative enactments, the general government has, from a sense of justice to the Indians, as well as from a conception of sound public policy, found it to be wise and obligatory to safeguard these dependent subjects in their property rights against the mastery and craft of the white man. So long as their reservations remained communistic, the property of the tribe, as such, was not jeopardized by attempted acquisition by outsiders; but when their tribal relations were disrupted, at the solicitation of the Government Commissioners, and it was proposed to allot the lands in severalty among those entitled thereto, Congress was confronted with a grave responsibility and duty it could not in honor shirk. The problem was experimental. The underlying policy in this rearrangement of treaty stipulations with the Indians was to stimulate in them a spirit of self-assertion and reliance, by inculcating the habit of industry and self-support. Feeling a strong misgiving as to their capacity and inclination to hold their allotments, to establish and maintain the family home, to soon conquer their inherent indolence and wastefulness, and apprehensive of their lack of virtue and moral courage to withstand temptation to part with their inheritance for 'a mess of pottage,' the whole legislation of Congress touching the allotment of Indian lands expresses on its face this feeling of distrust and a determined policy to put the allottees on probation during this experimental period. Accordingly, while authorizing the allotments in severalty, Congress conceded the lands, with a firm cable at-

tached to hold them to the exclusive use and possession of the Indians, without qualification restricting the power to divest themselves of the use and title until after the fixed period. \* \* \*"

Still observing its treaty obligation to protect these Indians in their allotted lands, and seeking to encourage the Indians in the exploitation of their property, the Government went a step further in the Act of Congress approved June 7, 1897 (30 Stat. 72) worded as follows:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

It appears from our statement that the mining lease under the terms of which the ore in question was mined was approved by the Secretary of the Interior. The land owner had been declared incompetent under the Act of June 7, 1897, *supra*, and full management, supervision and control over the mining of this land had passed completely to the Department of the Interior.

The Government through the leasing privilege extended to the Indian was experimenting with a view of development of business methods in the Indian. But by the later Act of March 3, 1921 (41 Stat. 1225-1248) Congress extended the restrictive period until March 3, 1946, and recalled the leasing privilege. This evidences two certain things: First, a conclusion by the Government that it could not faithfully keep its treaty promises to protect these lands for the enjoyment of the wards of the nation and permit the individual Indian to lease his own land. Second, that while the Government under the Act of June 7, 1897, *supra*, retained management and control over the mining of these lands where the Indian owner was incapable, it now assumed full control over the mining of all restricted Quapaw lands.

It was said in *U. S. v. Noble, supra*, that:

"It was the intent of Congress that the allottees during the period of restriction should be secure in their actual enjoyment of their interest in this land."

The court here was discussing a Quapaw case. The enjoyment by the Indian of his interest in mining land could only mean the enjoyment of the benefits to accrue by development, extraction and marketing of the ores found thereon. It being the intention of Congress to secure this to the Indian, legislation as above referred to was enacted from time to time.

The Government in carrying out its promises to protect these Indians and their lands was functioning under powers granted exclusively to it. It had one of

two choices: Prospect, explore and mine this land for the enjoyment of the Indian, or lease it to experienced miners under the supervision of the Government. The Government chose the latter course. In this choice it avoided the usual hazards and losses incident to zinc mining. They were assumed by the lessee and for which his compensation is fixed by the Government. The mere fact that the latter course was chosen does not change the fact that the Government is through its proper officer, the Secretary of the Interior, causing these Indian restricted lands to be mined.

In so far as the right of the State of Oklahoma to tax these leases, mines, products thereof, net or gross, or fix any kind of burden thereon, is concerned there can, we submit, be no difference whether the mining be done by the Government itself or the duty be delegated to this lessee under the practice as detailed above. The fact is ever present that the obligation of the Government is plain and its exclusive constitutional power is unquestioned.

The Congress of the United States, keeping in mind the treaty obligations of the Federal Government and its established policy of guardianship over these Indians, in the exercise of its governmental function fixed by the Constitution of the United States, withheld from the State of Oklahoma in the Enabling Act any power to limit or affect the complete authority of the Government of the United States in the premises in the following words:

"Section 1. Admission of Oklahoma and Indian Territory as State. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed" (334 Stat. L. 367).

It may be we unnecessarily state at length the history of the Government's connection with these Quapaw lands. Counsel for defendant in the court below admit this lease in question is a governmental instrumentality. The Supreme Court of the United States, in *Railway v. Harrison*, 235 U. S. 292, *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, *Howard v. Gypsy Oil Co.*, 237 U. S. 504, and *Large Oil Co. v. Howard*, 248 U. S. 549, has held to the same effect.

### **Federal Instrumentalities are Not Subject to State Tax Burden.**

State instrumentalities likewise are exempt from tax burden imposed by the National Government.

Why is this true? The Constitution of the United States contains no express limitation on either in the premises. But it is necessarily implied. This, because of

the very nature of our plan of government. It is a dual government, national and state, each equally supreme within its limited sphere of sovereignty. This limitation of supremacy is not fixed by state boundary lines, but rather by limits of sovereignty determined by the Constitution of the United States. The right to burden with tax is confined to the same limits.

This theory, now well established, is based upon the theory that the Constitution of the United States as a whole created two separate and distinct sovereignties, independent of each other in their specific and reserved powers, and that however full the grant of power of taxation might be in the constitution, there must always be subtracted from that power the right of the different sovereignties to perform their functions as such. As said by Mr. Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat 466, this proposition "has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

Owing to statements that sometimes are made in the opinions of state courts, and particularly the Supreme court of Oklahoma in the "Gross Production Cases," concerning authority or power of the state to tax all property within its boundary limits, it is well to further quote from the same opinion wherein the court said:

"1st, that a power to create implies a power to preserve. 2nd, that a power to destroy, if wielded by a different hand, is hostile to, and in-

compatible with these powers to preserve. 3rd, that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

*The taxing power of a state extends to and stops with the limits of its sovereignty.* What are the limits? The Supreme Court in the same case answered:

"The sovereignty of a state extends to everything which exists *by its own authority*, or is introduced by *its permission*; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? *We think it demonstrable that it does not.*"

The court summing up further said:

"The power to tax involves the power to destroy. The power to destroy may render useless the power to create. \* \* \*

"The result is a conviction that the states have no power, by taxation or otherwise, *to retard, impede, burden or in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

This principle enunciated in *McCullough v. Maryland* has been affirmed many times by the Supreme Court of the United States. In addition to cases heretofore cited, we refer the court to:

*Weston v. Charleston*, 2 Peters, 449, 7 L. Ed. 481, where the court said:

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits."

In *Brown v. Maryland*, 12 Wheaton, 419, 6 L. Ed. 678, the court said:

"It is obvious that the same power which imposes a light duty, can impose a very high one, one which amounts to a prohibition."

*People v. Commissioners*, 2 Black 620, 17 L. Ed. 451.

*Osborn v. The U. S. Bank*, 9 Wheaton, 738.

In *Van Bracklin v. Anderson*, 117 U. S. 151, 29 L. Ed. 845, the court said:

"All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

Bearing in mind Chief Justice Marshall's definition of state sovereignty as

"extending to everything which exists by its (state) own authority"

and that the right of taxation extends only over that which exists by its own authority, where does the State of Oklahoma secure the right to impose any tax of any kind, be it license, occupation or *ad valorem* in character, upon the property, output, net or gross, or income, used in or derived from these mines of the agents selected by the National Government to carry out its treaty obligations with the Quapaw Indian wards?

Are these mines in Quapaw lands improved and operated by authority or permission of the State of Oklahoma? Certainly not. The Enabling Act reserved

from the state all such powers or privileges. Were the rights to mine and the burdens upon the lessee to improve with mill, develop, produce and market ore, *created* or imposed by the sovereign State of Oklahoma? Certainly not. Then if the right to tax is co-existent with and limited to sovereignty, and sovereignty ceases with the authority to create or permit, wherein can it be seriously urged that the State of Oklahoma can rightfully assess a tax of any kind whatsoever upon the property used in or produced from these mining properties?

We cite also:

*California v. Railroad Co.*, 127 U. S. 1, 32 L. Ed. 150.

*Pollock v. Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759.

The Supreme Court of Oklahoma, in this and kindred cases, have repeatedly held:

"that the states are sovereign and the right to tax necessarily follows sovereignty."

It is sovereign over property only

"which exists by its (state) authority or is introduced by its permission."

The failure to recognize this clearly and well established distinction is responsible for the necessity of numerous appeals to the Supreme Court of the United States from attempts of the State of Oklahoma to exact a tax on these Indian properties. In each case the result has been the same, the principle has been reaffirmed.

The state may argue this is a property tax or an *ad valorem* tax or some other kind of tax, but it is a burden that retards. We cannot escape it. The name of tax is immaterial and the Supreme Court of the United States in these various cases from Oklahoma has seen fit to place its decision upon that ground rather than the name assigned by the state court and after all, the determination of the nature of the tax by a court is not binding on the Supreme Court of the United States.

"Upon the question of constitutionality of a tax levied under the state law, the Supreme Court must determine the nature of the tax for itself, and is not bound by the name given it by the state court."

*New York, Phil. Tel. Co. v. John I. Dolan et al.*,  
U. S. Supreme Court Reporter, Advance Opinion No.  
15, page 535.

**The state possesses no power to tax the product of this lessee obtained in its mining operations.**

The state will admit the lease in question is a federal instrumentality through which a governmental policy is being carried out for the benefit of Indian wards of the Government, and as such is non-taxable.

This is the conclusion of this court announced in the various cases heretofore named, and more recently in *Gillespie v. State*, 257 U. S. 501.

In the *Gillespie* case the question before the court was whether the State of Oklahoma could assess a state income tax upon income derived from oil royalties under a lease similar to the one here. This court there says:

"A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them. 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long."

Again:

"The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

The question in the Gillespie case before this court was whether Gillespie's share of oil and gas was taxable:

"It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape" (this court).

Likewise here the question is: Can the state lawfully assess and *ad valorem* tax on ores of the plaintiff while in the bins unsold and before the royalty interest of the Indian landowner is segregated? These ores were gross profits without deducting royalty and all production costs.

If, as we have seen, "the step from this (invalidity of tax on lease) to the invalidity of the tax upon income (net) from the lease is not long," the stride to the invalidity of the tax upon gross product or gross income would be much less. A tax on the latter would certainly constitute a more direct and serious hamper upon the operations of this federal agency.

If a tax on net income or a part of the gross revenue is a burden or "direct hamper" upon the effort of the National Government, will the attorney general seriously contend a tax on the gross output from month to month, or a tax on the gross output found in the bins on January 1st unsold, *and in each case the expense of production not being deduced*, would in a less degree hamper or restrict the United States in making best bargains for its wards? The question is not whether the tax be license, occupational or *ad valorem* in character, nor whether the property sought to be taxed is personal, real, tangible or intangible, but it is: *Does it interfere with the functions of the National Government in carrying out its policies with its Indian wards?* We have seen that it does if an attempt is made to tax the output after all expense of operation is deducted. We have seen that it does if it attempts to assess a tax on the gross output under the 1916 law. *Large Oil Co. v. Howard*, 248 U. S. 549. *Howard v. Gypsy Oil Co.*, 247 U. S. 503. That the court in the last two cases mentioned had the 1916 law in mind is made clear in the Gillespie case. Is it too far a step to conclude that the same weakness and vice exists in the attempt to burden with *ad valorem* tax a part of the gross output unsold on January 1st without deductions for expense of production or royalty share of the Indian? We submit, beyond doubt there can be no part way, no "part hamper" and no interference of any kind. This is inevitable if we concede "the power to create carries with it the power to preserve,"—a nec-

essary incident to the exercise of all powers of sovereignty.

The Supreme Court of the United States in the Gillespie case distinguishes the cases involving interstate commerce as not being applicable. It hold *Thomas v. Gay*, 169 U. S. 264, not analogous in principle, and then says:

"The rule as to instrumentalities of the United States, on the other hand, is *absolute in form* and at least *stricter in substance*."

In other words, the duty of the United States toward these wards of the nation to secure to them enjoyment of the mineral resources on their allotments and to secure the best and highest rewards by bargain, is absolute. If the state may tax this ore production sold or in the bins on any basis, it must be conceded the right is without limit short of confiscation. It may be said the state would not abuse the privilege. This is placing a limitation upon the power to preserve that which a sovereign government has exclusive power to create. It is placing instrumentalities of one sovereign government at the mercy, whim or discretion of a separate and distinct sovereignty: In *McCullough v. Maryland*, *supra*, the court said:

"But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not \* \* \* This, then, is not a case of confidence."

Can it be now argued that a tax on the product, net or gross, in the bins or out, does not affect the lease contract and the rights of the Indians? The power to tax, rightly understood, is without limit.

"It bears directly upon the contract, while subsisting and in force. The power operates upon the contract the instant it is framed and must imply a right to affect that contract."

*Weston v. Charleston, supra.*

These lessees are required to operate their mines continuously. Depressions in market conditions come. The lessee holds his ore for better prices. The State of Oklahoma steps in and fixes an *ad valorem* tax on ores so held and in the bins on January 1st. The result is a general cleaning of ore bins prior to assessment date, the market is depressed with surplus ores, prices drop, and the Indian owner who is paid a percentage of the sale proceeds, receives a less return because of the forced sale on a depressed market. This may appear frivolous, but when we realize that the local tax rate applicable to some of these properties runs as high as seventeen cents on the dollar we appreciate the conclusion reached by the courts that it "hampers the National Government in obtaining the best contract for its wards." The Indian owner as a rule receives as royalty *five* per cent of the gross proceeds derived from sales of ore. The State of Oklahoma, through its subdivisions, is claiming as high as *seventeen* per cent of the gross value in tax on ores in the bin in Ottawa County on restricted Quapaw lands, The state is seeking to take more than *three times* the

portion of the Indian owner on some of these lands. If the state has any such right, lessees are bound to take such charge into account in making contracts with the Government. The result is a heavy burden directly imposed on the operations of the Government.

If the opinion of the court in *Choctaw v. Harrison*, 235 U. S. 292, intimates coal at the pit may be taxed, we submit the reasons given for the conclusion in the Gillespie case by the same court will not sustain such a tax and it is controlling but we insist in our humble judgment the Supreme Court did not so infer in using the language at page 298 as follows:

"From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. *McCulloch v. Maryland*, 4 Wheat. 316, 425; *Farmers Bank v. Minnesota* 232 U. S. 516. But it is insisted that the statute rightly understood prescribed only an *ad valorem* imposition on the personal property owned by appellant—the coal at the pit's mouth—which is permissible according to many opinions of this court."

The court merely states the point urged by the state in support of the validity of the gross production tax and names the cases cited as authority therefor. These same cases are discussed in the Gillespie opinion and the court says they are inapplicable.

We submit that a consideration of the whole of the opinion justifies the statement that the court in *Choctaw*

v. *Harrison* was only reciting points urged by the state.

The regulations of the Secretary of the Interior promulgated pursuant to the authority of the leasing statute of June 7, 1897, *supra*, provide:

"All sums due as bonus or royalty or otherwise, shall be a lien on all implements, tools, movable machinery and all other personal chattels used in operating said property, *and also upon all the unsold minerals obtained and severed from the land herein leased as security for the payment of said sum.*"

We are confident that the court will not conclude the state may exercise a power, unlimited necessarily, that will lessen the security obtained by the National Government for its wards. *If we concede the power it extends even to confiscation.* In that event the principle is recognized, that one sovereignty may tax another sovereignty out of existence.

It cannot be questioned now that the Supreme Court of the United States in *Large Oil Co. v. Howard supra*, has finally decided the Oklahoma Gross Revenue Tax of 1916 is invalid, and this, because it burdens the operations of the Government. The same court in the Gillespie case held the state can not tax the net income. The step from this to the invalidity of the tax on ore in bins is not long, and we submit is certain. This is the last word of the court. The tax on net income is much more remote than a tax on gross ore in bins from which net income is extracted.

## II.

The lease and lessee, being a federal instrumentality determined by the national government as the means of carrying out its obligations to Quapaw Indians, are not taxable by the state. The fruit of said lease, be it termed interest, income, or product (net or gross) is likewise in every respect exempt from any tax burden sought to be imposed by the state.

Fortunately this question is fully settled in *Gillespie v. State, supra*. The court there states the rule plainly:

"In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void, (*Pollock v. Farmers L. & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 158 U. S. 601). A rule lately illustrated by *Evans v. Gore*, 253 U. S. 245, 64 L. Ed. 887."

We have attempted to show that net income is received after ores are sold. There can be no logical reason assigned for holding net profits non-taxable because they are the fruit of a non-taxable source and withholding such exemption from the direct product from which the net income is realized.

In *Pollock v. Farmers L. & T. Co.*, *supra*, the court said:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. \* \* \* It is the substance and not the form which controls."

No authority other than the Gillespie case should be required to sustain our second proposition. The state concedes tax exemption to the lease. The net income and the product from which income is realized carries the same exemption.

Since the case of *Pollock v. Farmer's Loan & Trust Co.*, *supra*, it has no longer been open to question, but that a tax upon income is a tax upon the principal from which such income is derived. Mr. Chief Justice Field in his opinion in the Pollock case (157 U. S. at page 591), says:

"It must be conceded that whatever affects any element that gives an article its value, in the eyes of the law, affects the article itself."

### **Conclusion.**

We confidently assert that it is clearly established:

First. These leases are governmental instrumentalities chosen by the National Government as a means of carrying out its obligations and policy toward these Indians; that, as such, no tax or burden fixed by the state which affects the subject-matter, however inconsequential or remote, is authorized and is beyond the power of the state.

Second. The effect of any burden in the nature of a tax must be considered in the light of its effect if applied to the extreme limit of taxing power—confiscation.

Third. The sole question here is, could the tax in question, if levied to the limit "hamper the operations of the Government," and not whether the property sought

to be taxed be real or personal, tangible or intangible, nor the tax be in character license or *ad valorem*.

Fourth. The source (lease) being exempt from tax, the income, gross or net, in the bin or marketed, carries the same protection.

Fifth. There is stronger reason for extending the exemption to *ad valorem* tax on ores in bin than can be offered for claim of exemption on net income.

Sixth. It is the effect of a tax, and not its form or name, that determines whether it burdens a federal agency.

For these reasons we believe the judgment should be reversed.

Respectfully submitted,

A. SCOTT THOMPSON,  
Miami, Oklahoma,  
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A. C. WALLACE,  
VERN E. THOMPSON,  
RAY McNAUGHTON,  
All of Miami, Okla.,  
*Of Counsel.*

## APPENDIX.

✓ For the convenience of the court, we are quoting in part Section 9814 of the Compiled Statutes of the State of Oklahoma of the year 1921, under which the tax complained of herein is sought to be assessed.

“Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D., 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of

petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act. \* \* \*

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described: but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxation for any subsequent year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time \* \* \*"

*In the Supreme Court of the United States. Jaybird Mining Company, a corporation, Petitioner, vs. Joe Weir, County Treasurer of Ottawa County, Oklahoma, Respondent.*

**Notice of Respondent.**

*To the above named respondent and his attorneys and counsel:*

Take notice that at the opening of the Supreme Court of the United States on Monday, the ..... day of ....., 1925, at Washington, D. C., the petition for writ of certiorari to the Supreme Court of the State of Oklahoma in the cause and suit of Joe Weir, as Treasurer of Ottawa County, Oklahoma, plaintiff in error, against Jaybird Mining Company, a corporation, defendant in error, lately pending in said Supreme Court of Oklahoma, will be submitted to the Supreme Court of the United States, and that in support of said petition a brief will also be then presented to said court.

Copy of said petition for certiorari and brief in support thereof are herewith presented to you, this .... day of ....., 1925.

A. SCOTT THOMPSON,  
*Attorney and Counsel for Petitioner.*

Service of above notice acknowledged this ..... day of ....., 1925.

.....  
.....

*Attorneys and Counsel for  
Respondent.*

Office Supreme Court, U. S.  
FILED

MAR 10 1925

298 WM. P. STANLEY  
CLERK

IN THE  
**Supreme Court of the United States**

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JAYBIRD MINING COMPANY, A CORPORATION,  
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, DEFENDANT  
IN ERROR.

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JAYBIRD MINING COMPANY, A CORPORATION,  
PETITIONER,

VS.

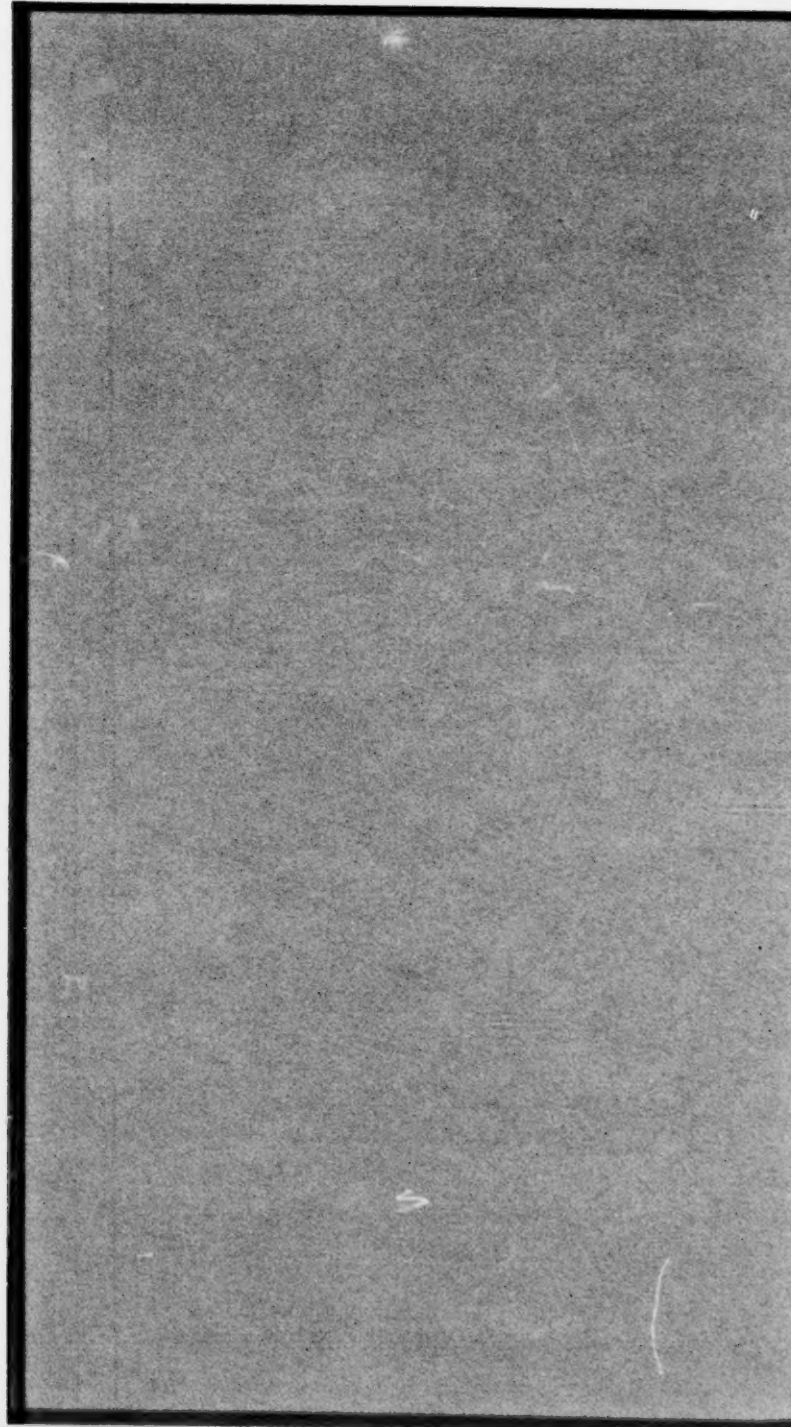
JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, RESPONDENT.

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**BRIEF AND ARGUMENT OF DEFENDANT  
IN ERROR.**

---

A. L. COMMONS,  
JOHN H. VENABLE,  
WM. M. THOMAS,  
all of Miami, Oklahoma,  
*Attorneys for Defendant in Error.*



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No. 929.

IN THE  
**Supreme Court of the United States**

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JAYBIRD MINING COMPANY, A CORPORATION,  
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, DEFENDANT  
IN ERROR.

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JAYBIRD MINING COMPANY, A CORPORATION,  
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA  
COUNTY, OKLAHOMA, RESPONDENT.

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**STATEMENT.**

The able counsel for the plaintiff in error in this cause has made a rather full statement of the record in this case, and we desire to emphasize the fact only that this lawsuit was begun by the petitioner in the District Court of Ottawa County, Oklahoma, to recover about \$2300.00 from the Treasurer of Ottawa County, which it had paid to the treasurer of said county in taxes, assessed and levied against lead and zinc ore in the bins

at the mine of said plaintiff in error on the first day of the taxing period of the State of Oklahoma, which assessment of said ore so found in the bins petitioner alleged was an illegal assessment and levy, for the reason the mine was located on a restricted Quapaw Indian allotment and that the mining company was operating under a lease executed by the Secretary of the Interior, and that said mining company was a federal agency and instrumentality. No copy of the lease was attached to the petition filed herein, and there is no record showing the details of the terms of such lease.

We desire to impress on this court the fact that the question involved in this case is one of grave importance and deserves the grave and deep consideration of all concerned. The authority of the state to tax lead and zinc ore as of the first day of the taxing period, found in the possession of the defendant in error, the Jay Bird Mining Company, however long it may have lain in the bins after it has been extracted from the earth, is questioned, if such lead and zinc ore has been mined from lands belonging to a restricted Quapaw Indian by a corporation, *organized* and engaged in the business of mining generally under and by virtue of the laws of the State of Oklahoma, and in this particular case operating under a lease obtained from the Secretary of the Interior; it would seem also to involve the power of the state to tax coal at the pits mouth; the stone taken from the quarry; oil in storage tanks, where such property has been taken from restricted Indian

lands under departmental leases. The question is still further reaching in that it would challenge the power of the state to tax the corn in the crib; the wheat in the granary; cotton in the bale; broomcorn in the warehouse, and in fact any and all crops taken from restricted Indian lands under departmental leases. It would question the power of the state to tax lumber sawed from timber cut from restricted Indian land, under contracts with the Secretary of the Interior. It would withdraw from taxation the greatest sources of wealth in the State of Oklahoma, without in any way benefiting the Indian.

### **Power of Taxation.**

The power to tax is inherent in the state, and such power extends to all kinds of property which has its situs within the sovereignty of the state, except such property as is exempt, either by some constitutional provision or legislative enactment; that if the legislative authority exempts any property from taxation it is a matter of grace, and not an account of the merits of the property.

Section 9574 of Compiled Statutes of Oklahoma, 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

This includes all property found in the State of Oklahoma on the first day of January of each year belonging to persons and corporations. There are a number of exceptions but among such exceptions we fail to find ore while on the other hand we find that the following Section 9814, of Compiled Laws of Oklahoma, 1921, provides specifically for the taxation of ore found in the bin, to-wit:

"The payment of taxes herein (meaning gross production tax) imposed shall be in full and in lieu of all taxes by state, counties, cities, etc. \* \* \* but any interest in land other than that herein enumerated, and OIL IN STORAGE, ASPHALT AND ORES bearing minerals heretofore named, mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxation for subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Thus it will be seen that the statutes of the State of Oklahoma, provide specifically for the taxation of the property in controversy in this case.

### **Governmental Instrumentality.**

It seems that the petitioner herein relies solely on the proposition that a governmental instrumentality is involved in this case; that the Jay Bird Mining Company, an Oklahoma corporation, by reason of a lease which it obtained from the Secretary of the Interior on restricted Quapaw Indian land becomes a governmental

instrumentality, and that to require it to pay taxes on its tangible property would burden such instrumentality and violate a vital part of the Constitution of the United States.

What is a governmental instrumentality or agency, which seems to be used to mean one and the same thing? Is a mill or concentrating plant for separating lead and zinc ores from the dirt or rock a governmental instrumentality? Does it consist of so much timber, machinery, brick, mortar, concrete or granite or does it mean lease contracts giving the mining company the right to take lead and zinc ore from the Indian lands? Would any one say that the brick or stone building and the furniture of a national bank is a governmental instrumentality? Or would they say that the charter, the national bank notes, its drafts and other paper issued by such banks are governmental instrumentalities? To ask the question is to answer it.

We contend that the right to tax the lead and zinc ore in controversy rests on the following principles:

#### I.

**That all property whether tangible or intangible over which the sovereignty of the state extends is subject to taxation by the state and that the sovereignty of the state extends over the class of property involved in this suit.**

## II.

That no tangible property is ever exempt from taxation without there is some constitutional or statutory provision specifically exempting such property from taxation; that such property is never exempt from taxation by implication.

## I.

We believe that the able counsel for the plaintiff in error herein has misconstrued the definitions or principles laid down by the Great Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat. 466, 4 L. Ed. 579, when he said as a basis for his decision in that most famous case:

1. "All subjects over which the sovereign power of the state extends are objects of taxation; but those over which the state does not extend are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident."

2. "The sovereignty of the state extends to everything which exists by its authority, or is introduced by its permission."

**Sovereignty.**

It is the claim of the Jaybird Mining Company that it is a governmental instrumentality. If the test that was applied in the case of *McCullough v. Maryland*, *supra*, by Chief Justice Marshall be invoked, it is easy to see that the mining company, as shown by the pleadings herein, is a creature of the State of Oklahoma, while in the case, *McCullough v. Maryland*, it was a

bank of the United States involved, created by an Act of Congress exercising its authority under the Constitution of the United States. Even so, were we trying to tax the notes, drafts, checks and other paper that might be issued by one of the more modern national banking institutions, a Federal Reserve Bank or War Finance Corporation or Federal Farm Loan Bank.

On the other hand the state would have the right to tax any of the corporations, including mining corporations, state banks or any other of the hundred or more of various kinds of corporations, and require such corporations to pay a tax or license and on failure to do so could revoke the charter of such organizations. It could require a state bank to pay a revenue on any paper that it might issue just as the State of Maryland was seeking to make the National Bank of the United States to place a stamp on its paper before it could circulate the same.

The United States Government has nothing to do with the organization of the mining company involved in this case. All the interest it has is to collect the royalties after the lead and zinc ore has been sold or its value ascertained—not in kind but in money. And on failure of the mining company to comply with its lease, the Government may bring suit for the Indian for the royalty, and for a failure to operate the mine in the manner provided, may forfeit the lease existing between the mining company and the Government. The state can tax even the operation of the mining company

where it is operating on land other than restricted Indian land and the Government could as easily say you are placing a burden on an instrumentality. The state could tax the profits arising from leases on mining lands other than restricted Indian lands, and could tax the royalties derived from such source.

## II.

**No tangible property is ever exempt from taxation without there is some constitutional or statutory provision specifically exempting such property from taxation; that such property is never exempt from taxation by implication.**

X / We do not want to be understood as contending that the lease held by the Jaybird Mining Company, the profits it may derive from the operation of the mine on restricted Indian land or on any royalties it might obtain from any lessee on such lands, nor that the state has a right to tax the royalties received by the Indian, for all of these would be a direct burden on the lease, which is a governmentality, and this court has already passed on these questions in the negative instrumentality. *What we are attempting in this case is to require a visible, tangible and very valuable class of property found with the great mass of the property of the state to bear its just burden of ad valorem taxation along with other property of the state of the same class, and all other tangible property.*

In *Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, this court held that the value of a depart-

mental lease held by said company could not be considered by the State Board of Equalization in determining the value of the properties of said company as a public utility or public service concern.

In *Gillespie v. Oklahoma*, 259 U. S. 501, 66 L. Ed. 338, this court held that the royalty interest could not be taxed as a part of the income of Gillespie, who held royalty interest in restricted Indian oil leases. These holdings have been followed in other cases. But no case has been passed on by this court where there was specific tangible property involved.

In *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445, this court held that the gross production tax was intended as a substitute for the *ad valorem* property tax. And in this case the income tax was sustained because the gross production tax was a substitute for the *ad valorem* property tax. The Supreme Court of Oklahoma held that the gross production tax was a property tax in *In re Skelton Lead & Zinc Co.'s Gross Production Tax of 1919*, 197 Pac. 497. There are many cases in which this court has made a similar holding and we deem it unnecessary to cite such cases as this court is familiar with them.

**There is a clear distinction between the agents or means used by the government in carrying out its governmental policies and the property of such agencies.**

If the right of the State of Oklahoma to tax all subjects which come under the sovereignty of the state,

In *Thomson v. Union Pac. Ry. Co.*, the court said:

"It is true that some of the reasoning in the case of *McCullough v. Maryland*, seems to favor the broad doctrine, but the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises to the Government of the United States."

See also *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 56 L. Ed. 801.

Mr. Justice Shiras in *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, in which it was held that a tax on cattle grazing on Indian lands belonging to Osage Indians in Oklahoma, under authority of an Act of Congress authorizing the same was too remote and indirect to be termed a tax on the land, said:

X "The taxes in question here were not imposed on Indians, but on cattle as property of lessees, and as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on the leases so held by the owner of the cattle, and is too remote and indirect to be regarded as an interference with the legislative powers of Congress."

In *Union Pac. Ry. Co. v. Peniston*, 18 Wall. 5; 21 L. Ed. 787, the railroad was chartered by an Act of Congress and large grants of land were made for the railroad with provision that such railroad was to transport mail, soldiers' supplies, and it was also provided that the Government might appoint five of the directors of said road; that under certain contingencies, the Government might take possession of the road and all

its properties and operate it. The suit was brought over the right of the State of Nebraska to impose an *ad valorem* tax on the property of the road. It was admitted that the company was an agent of the Government. This court, in that case, speaking through Mr. Justice Strong said:

*"It may therefore be CONSIDERED SETTLED THAT NO CONSTITUTIONAL IMPLICATION PROHIBITS A STATE TAX UPON THE PROPERTY OF AN AGENT OF THE GOVERNMENT, merely because it is the property of such agent. A contrary doctrine would greatly embarrass the states in the collection of the necessary revenue without any corresponding advantage to the United States."*

In *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903, this court affirmed and emphasized the same doctrine on practically the same facts with the last case cited. The court speaking through Chief Justice Fuller, said:

*"It may be regarded as generally settled that although corporations may be agents of the United States, but the property is not the property of the United States, but the property of the agents, subject to limitations laid down in Union Pac. R. R. Co. v. Penniston, supra. Van Brocklin v. Anderson, 117 U. S. 29 L. Ed. 845."*

The case of *Elder v. Wood*, 208 U. S. 226, 52 L. Ed. 464, holds that a gross production tax upon mining claims from the Government was taxable.

See also *Forbes v. Gracy, supra*, in which case the legislature of the State of Nevada passed an act pro-

viding a "NET PROCEEDS TAX" ON MINERALS AND ORES OBTAINED FROM GOVERNMENT LAND UNDER MINING RIGHTS OBTAINED FROM THE GOVERNMENT, and this court upheld the legality of the tax so laid on such minerals and ores, and in that case the court said:

"The moment this ore becomes detached from the soil in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine, and extracted the ore or other mineral product. It is then *free from any lien, claim or title of the United States, and is rightfully subject to taxation by the state, as any other personal property is.*

*The truth of this proposition is too obvious to need or admit of illustration or elaboration \* \* \**

In *Utah & N. W. Ry. Co. v. Fisher*, 116 U. S. 28, 29 L. Ed. 542, it was held that the lands and railroad of the railway company, within the limits of Foothill Indian Reservation, in the Territory of Idaho, was lawfully subject to territorial taxation. See also *Marocipa & Pac. Ry. Co. v. Arizona*, 156 U. S. 347; 36 L. Ed. 447.

In *Wagoner v. Evans*, 104 U. S. 588; 42 L. Ed. 1154, the same question was decided by this court, arising in Canadian County, Oklahoma, wherein cattle was on Indian lands under a departmental lease as in *Thomas v. Gay, supra*, and this court held that the cattle was taxable for the reason the burden, if any, was too

remote and indirect. See also *Montana Catholic Mission v. Missoulli County Assessor*, 200 U. S. 118; 50 L. Ed. 398.

We could continue indefinitely to cite cases and authorities on this question but we deem it unnecessary, but we should like to advert to one case in which the able counsel for plaintiff in error has seemingly failed to understand an *obiter dicta* expression of this court in the case of *Choctaw, O. & G. R. R. Co. v. Harrison*, 235 U. S. 292; 59 L. Ed. 234. This court in that opinion speaking of the Oklahoma Gross Production Tax Law of 1907-8, which provided for such a tax *IN ADDITION TO AN AD VALOREM TAX* held that such a tax because of its being in addition to ad valorem tax was intended for and in fact was a license or privilege tax, and of course rightly held that it was illegal. But in the course of the discussion of the tax made the following statement, which, we think, was guarded:

"But it is insisted that the statute, rightly understood, prescribed only ad valorem imposition on personal property owned by appellant—the coal at the pits mouth—which is permissible, according to many opinions of this court."

And citing the following authorities:

*Thomson v. Union Pac. R. Co.*, *supra*.  
*Union Pac. R. Co. v. Penniston*, *supra*.  
*Central Pac. R. Co. v. California*, 162 U. S.  
 91, 40 L. Ed. 903.  
*Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740.

The expression, "*Which is permissible, according to many opinions of this court,*" is the phraseology that is in question. We believe that no citations would have been made, if the court was quoting the counsel for the appellee in that cause.

This is the only expression of this court on the question involved in this case, that is exactly in point and that expression seems to be in line with all the decisions of this court where the question of taxation of the tangible property of any agent that may be performing services for the Government.

In case of *Gillespie v. Oklahoma*, 257 U. S. 501; 56 L. Ed. 388, the same principle was laid down however by this court, in passing on the right of Oklahoma to lay a tax on royalty, when the court took the precaution to say:

*"Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases as those here."*

This leaves an implication that, if Gillespie had received his royalty in the form of oil in the storage tanks, that such oil so taken from land and placed in such tanks, could be taxed on an ad valorem basis. The status of such property would be exactly the same as ore in the bins in this case. Profits as contemplated by the Oklahoma Income Tax Law is indefinite and intangible and very uncertain, so much so that no one except the person whose income is in question can know what the value of it is, for the reason that it is net

profits that is taxable. You cannot see or feel such property, and no physical possession of it can be had, if indeed it could be deemed property. On the other hand if the oil is taken from the earth and placed in storage tanks, it becomes the subject of theft and arson and the courts of the state would have jurisdiction over such property, while the SOVEREIGNTY OF THE GOVERNMENT would not extend over it and the Government would be powerless to punish for the larceny or arson of such property. It is the tangible personal property of the owner, and no government except the state government could protect the owner of such property in this rightful possession of the property.

We believe that a mistaken idea has arisen in the minds of counsel for plaintiff in error herein as to what is tangible property and what is not. A lease is not tangible property or property at all according to the primary meaning of the word. It is a representation of value, and although after it has become operative and afterward lost and the paper cannot be found, yet the owner of the lease would still have his rights in the property leased and the courts would uphold his rights, even as against the Government. If an oral lease or other contract concerning Indian lands was authorized by Congressional action, and the appellant had entered into such a lease with the Department of the Interior, he would have rights just as valuable as if the same had been reduced to writing. Any kind of paper, whether lease, promissory note, deed or paper issued by national banks are only representation of value. Value is legis-

lated or contracted into such paper, but they have no intrinsic value and are not property in the true sense of the word. They may be the *MEANS OR INSTRUMENTS* used by the Government in carrying out its policy and cannot be taxed.

### **The Real Test.**

After reading the brief of able counsel for plaintiff in error in this case we are led to believe that they rely on the fact that the *TAX IS A BURDEN* for the *RULE* to govern this court in its decision in this case. We admit that it is a burden to pay taxes for the protection of the laws of the state and nation, but a careful reading of the authorities shows that no rule for taxation can be deduced because of that fact. In *McCullough v. Maryland*, the court took pains to distinguish between the right of the State of Maryland to tax the operation of the bank and the paper issued by the bank under the Act of Congress creating the bank, and the tangible property of the bank, when he said *that the state could tax the property held by the bank in common with all other property of the state although it might be burdensome*. This can in no sense be considered an interference with the operation of an instrumentality of the Government. The state has the right to tax the building in which a national bank has its domicile and convey the title to it. It could sell the furniture of the bank to enforce the payment of taxes.

Chief Justice Marshall in the *McCullough* case also said that the *stock held by the stockholders of the bank was also taxable*. Now, if the rule is founded on the fact that the *TAXES ARE A BURDEN* and thus deduce a rule founded on that, when then would you say that the ore could be taxed? We should like to know

when the authorities would be warranted in levying a tax on such property. Would you say that such property could be held in the bins for years; that it could be sold by the operator; or that its form could be changed and still the property be not taxable? In other words suppose that this concentrating plant where the ore is separated from the rock was connected with a smelter and by that stood also a roller mill where the zinc slab would be made into sheet zinc, ready for use on buildings or other purposes, still a tax on it would be *burdensome*. Would you say that the ore could be taxed after it has passed into the hands of third parties by sale or barter? If you say it is, then you depart from a rule you seek to establish and which is founded on the proposition that the tax is *BURDENSOME*. Such a rule would be absolutely unsound.

We maintain that Chief Justice Marshall in the case of *McCullough v. Maryland*, *supra*, has given the rule which should govern in all cases where the questions like the one in the case at bar has arisen. If the corporation is a creature of the state, then the state has the right to cause such corporation, whether operating a lease on a restricted Indian allotment under a departmental lease or on unrestricted land, to perform certain conditions before it can do business in the state and can force such to pay a license tax or a property tax, as a prerequisite to doing business in the state, but could not require the payment of a license to mine under a departmental lease; nor a tax on the lease or profits arising under the lease or on the royalty that it may receive on such a lease. On the other hand, if the corporation is a creature of an Act of Congress, as are national banks, reserve banks or other Federal corporations, the state cannot require such a license or tax as a prerequisite to do business in the

state, but may tax its tangible property. Then the right to tax may rest on *SOVEREIGNTY* as defined by Chief Justice Marshall.

The test as to whether or not TANGIBLE PROPERTY CAN BE TAXED BY THE STATE DEPENDS ON WHETHER THERE IS ANY CONSTITUTIONAL OR STATUTORY PROVISION EXEMPTING SUCH PROPERTY FROM TAXATION. SUCH PROPERTY IS NEVER EXEMPT BY IMPLICATION.

### **Conclusion.**

We submit that after a review of the leading cases on the subject involved in this action, we are unable to find any reason why the property in question herein should escape taxation, for when the ore is taken from the land, there is no connection whatever with the property and the restricted Indian land. We therefore ask that the writ of error in this case be denied and that on final hearing that this court affirm the decision of the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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